An introduction to the new Family Law Act, 1986

Ministry of the Attorney General

Ontario has recently undergone several significant changes in the area of family law that will profoundly affect the way that most spouses order their affairs. The Family Law Act, 1986 came into force in Ontario on March 1, 1986. You are now covered by this new legislation, unless you had a final judgment of the court or separation agreement before June 4, 1985.

This information sheet is designed to provide an overview of the legislation responsible for these changes, and should not be considered exhaustive. For complex or specific problems, you should consult your lawyer.

The developments in family law can be discussed under five general headings:

A. The division of property.
B. The matrimonial home.
C. Support obligations between spouses.
D. Domestic contracts.
E. The enforcement of support and custody.

A. DIVISION OF PROPERTY

The Family Law Act, 1986 acknowledges that marriage is an economic as well as a social or family partnership.

1. How is the Family Law Act, 1986 different from previous legislation?

Prior to the enactment of the Family Law Act, 1986, Ontario's family law was governed by the Family Law Reform Act, which was first enacted in 1975, and further amended in 1978. The Family Law Reform Act covered the same areas that the Family Law Act, 1986 covers, but the rules have now been changed. Under the Family Law Reform Act, for example, if a marriage broke down and the spouses separated or divorced, the act provided rules to assist them with division of their property. The spouses needed to divide their assets into two categories: family assets and non-family assets. Family assets, including property the spouses and their children normally lived in and used, such as

their home, furniture, and vehicles, were equally divided between the spouses. Non-family assets, on the other hand, were retained by the spouse who had legal ownership of them; and they would only be divided if the spouse who did not have legal ownership could prove that he or she had made some financial contribution towards the assets' acquisition. This often resulted in inequities when the spouses had minimal family assets but one spouse had a great many non-family assets.

In addition, the Family Law Reform Act only applied if the spouses separated or divorced. It did not provide any assistance when one spouse died, leaving the surviving spouse with minimal or no property in a will.

The Family Law Act, 1986 attempts to address both these problems.

2. What is the new approach to the division of property acquired by spouses?

The Family Law Act, 1986 abolishes the distinction between family and non-family assets in an attempt to ensure that all property acquired during the course of a marriage is divided equally, subject to certain limited exceptions. As a general rule, any increase in the value of the assets acquired during the course of the marriage will be shared equally. This means that when a marriage ends, whether by divorce, separation or death, each spouse is entitled to a share of everything acquired by both spouses.

3. Who is entitled to the benefit of the new rules?

Only legally married spouses are entitled to use the rules of property division provided by the Family Law Act, 1986.

4. What kinds of property are subject to division between spouses under the new legislation?

Every kind of property is subject to division, including businesses, farms, pensions, savings and RRSPs, regardless of the way in which they were acquired or whose name they were acquired in.

5. Are there any types of property that do not have to be divided?

Yes. The act sets out certain classes of property that are not subject to division. In addition, the act continues to acknowledge the special status of the matrimonial home.

The following items are not normally subject to equal division between the spouses:

a. the value of property owned by one spouse prior to the marriage;

b. the value of property that was acquired by gift or inheritance from a third person after the date of the marriage;

c. income from property that was acquired by gift or inheritance from a third person after the date of the marriage, but only if the person that made the gift or provided the inheritance stipulated that income from it was not to be shared;

d. damages, or a right to damages, for personal injuries, nervous shock, mental distress or loss of guidance, care and companionship;

e. the proceeds, or a right to proceeds, from a life insurance policy;

f. any property into which the above items could be traced;

g. any property that the spouses had previously agreed, by way of contract, was not to be included in the division of property.

6. Does a judge have the power to order that the assets not be shared equally?

Yes, but only under the following very limited circumstances.

a. one spouse failed to tell the other about debts or other liabilities existing at the date of the marriage;

b. debts or other liabilities that the spouse claimed to reduce their net family property were incurrred recklessly or in bad faith;

c. part of the spouse's net family property consisted of gifts from the other spouse;

d. a spouse intentionally or recklessly depleted his or her net family property;

e. a spouse would get a disproportionately large share of the property acquired in relation to a period of cohabitation under five years;

f. one spouse incurred disproportionately more debts or other liabilities than the other for support of the family;

g. there is a written agreement between the spouses other than a domestic contract;

h. any other circumstance relating to the acquisition, disposition, preservation, maintenance or improvement of property.

Not only must one or more of these conditions be met but, the equal division of property must also appear unconscionable in the eyes of the court.

7. What special status does the matrimonial home have?

The matrimonial home was protected in the Family Law Reform Act as well as in the new Family Law Act, 1986 because it is often the largest asset owned by the spouses and is special in the sense that it

often forms the centre of the family's life. The matrimonial home continues to have special status and is therefore subject to equal division regardless of the manner in which the home was acquired. Equal division applies even if the home forms part of one of the exceptions in point 5. For example, if one spouse inherits money and uses the money to pay down the mortgage on the family home, no exception is made for the inheritance, and the home is divided equally. Similarly, if a spouse receives damages from a motor vehicle accident and uses the damages to renovate the matrimonial home's kitchen, no special credit is given for the use of the damages from the motor vehicle accident.

8. How is the division of property actually calculated?

Each spouse starts by calculating his or her net family property. To calculate net family property, a spouse adds up the value of all the property that he or she owns on the date of separation. From that amount, the spouse deducts his or her debts and liabilities that exist as of the date of separation. This figure is the approximate value of property owned by the spouse on the date of the separation. From that amount, the spouse then deducts the value of property he or she brought into the marriage after deducting his or her debts and liabilities that existed as of the date of the marriage. Finally, the spouse deducts the value of property exempt from sharing under point 5 above. The result of this calculation is a spouse's net family property. The spouse with the lower net family property value deducts it from the other spouse's higher figure and is entitled to half of the difference between the two figures. This ensures that each spouse leaves the marriage with exactly the same net family property, plus the assets that were exempt from sharing, (if any), like gifts or inheritances.

9. Why does the act talk in terms of the division of value and not in terms of division of assets?

Unlike the Family Law Reform Act, the Family Law Act, 1986 divides the value of property acquired by the spouses, rather than the assets themselves. The goal is to ensure that the property value is transferred to the spouse that has less at the end of the calculations. For this reason, one spouse does not transfer half of the assets to the other spouse, but rather compensates the other spouse for his or her interest in them, via an equalizing payment that could be a simple cheque.

10. Does this calculation apply when one spouse dies?

For all deaths after March 1, 1986, the surviving spouse can choose between taking what is given to him or her in the deceased spouse's will, or an equalizing payment based on net family property value. If the equalizing payment option is selected, the calculation described in point 8 is used, except that the property of the spouses is valued as of the day before the spouse died.

B. THE MATRIMONIAL HOME

1. Aside from the special treatment that the matrimonial home receives during the division of property, what other special status is given to it in the Family Law Act, 1986?

Both spouses have an equal right to possession of a matrimonial home -- a right that cannot be given away by way of a domestic contract or any agreement between the spouses. One or both spouses may designate the property owned by one or both of them as a matrimonial home, to ensure that the property is not disposed of or encumbered without the other spouse's consent.

The act also provides that the court may make an order giving one spouse exclusive possession of the home on a temporary or interim basis. In order to make such an order, the court may consider, among other things, the best interests of any children affected, the financial position of the spouses, and any violence

committed by one spouse against the other spouse or the children. Once the order is made, the excluded spouse is not permitted in or near the matrimonial home.

2. What will happen if a spouse continues to come to the matrimonial home after such an order is made?

A person who contravenes an order for exclusive possession is guilty of an offence and is liable, in the case of a first offence, to a fine of not more than $1,000, or to imprisonment of not more than three months, or both. In the case of a second or subsequent offence, the fine can be as much as $10,000, and the imprisonment can be for two years, or both. Furthermore, a police officer is authorized to arrest, without a warrant, a person the police officer believes on reasonable and probable grounds to have contravened an order for exclusive possession.

C. SUPPORT OBLIGATION

1. Are there new support provisions under the Family Law Act, 1986?

Yes. But the changes are not as dramatic as those relating to the division of property. The act sets out a list of criteria that a judge should consider when making an order for support, that includes, but is not limited to, the following:

a. the dependant's and respondent's current assets and means;

b. the assets and means that the dependant and respondent are likely to have in the future;

c. the dependant's capacity to contribute to his or her own support;

d. the respondent's capacity to provide support;

e. the dependant's and respondent's age, and physical and mental health;

f. the dependant's needs. To determine this, the courts consider the accustomed standard of living enjoyed by the parties while they resided together;

g. the measures available for the dependant to become able to provide for his or her own support and the length of time and cost involved to enable the dependant to take those measures;

h. any legal obligation of the respondent or dependant to provide support for another person;

i. the desirability of the dependant or respondent remaining at home to care for a child;

j. a contribution by the dependant to the realization of the respondent's career potential.

2. Is an order for support binding on the estate of the deceased spouse?

Yes. Under the new Family Law Act, 1986 an order for support binds the estate of the person paying support, unless the order provides otherwise.

3. Can support orders be indexed to keep pace with inflation?

Yes. In an order for support, made under the new act, the court may provide that the amount payable is increased annually on the order's anniversary date by an indexing factor set by the Consumer Price Index of Canada.

4. Who is covered by the support provisions of the Family Law Act, 1986?

Unlike the rules for division of property, the support provisions extend to individuals who have resided together (common law) for three or more years as man and wife, as well as legally married people. It

also covers individuals who have had a relationship of some permanence, if they are the natural or adoptive parents of a child.

5. What are a parent's obligations to support a child?

Every parent has an obligation, to the extent that he or she is capable, to provide support in accordance with need, for his or her unmarried child who is a minor or is enrolled in a full-time program of education. This obligation does not extend to a child who is 16 years of age or older and has withdrawn from parental control.

D. DOMESTIC CONTRACTS

1. What is a domestic contract?

A domestic contract is a marriage contract, a cohabitation agreement or a separation agreement.

A marriage contract is an agreement entered into by a man and a woman who are or intend to be married to each other. They may agree on their rights and obligations under the marriage, or on separation, the annulment or dissolution of the marriage, or death. The contract may deal with ownership in or division of property, support obligations, or even the right to direct the education and moral training of their children. It may not deal with the right to custody of, or access to, children of the marriage.

A cohabitation agreement is a similar contract entered into between a man and a woman who are living together or intend to live together but are not married to each other.

A separation agreement is a contract between a man and a woman who have lived together, but are now living separate and apart. In it, they may agree on their respective rights and obligations, including the ownership or division of property, support obligations, and the right to direct the education or moral training of their children, and the right of custody of, or access to, their children.

2. What are the formal requirements for a properly executed domestic contract?

The contract must be in writing, signed by both parties, and witnessed.

E. SUPPORT AND CUSTODY ORDERS ENFORCEMENT

1. What is the new Support and Custody Orders Enforcement Act designed to do?

This legislation creates a new office in the Ministry of the Attorney General known as the Office of Support and Custody Enforcement. This office has the power to enforce support and custody orders on behalf of a spouse or parent at no cost. In doing so, the office may take any necessary steps to collect a support payment or to enforce a custody order, including some things that the parent or spouse cannot do for themselves. For example, the office can demand information from a third party to obtain the address and location of a defaulting spouse. The office may also demand information from the federal government, under an agreement between the provincial and federal governments. If a spouse is in arrears on a support order but stands entitled to receive an income tax refund, the office has the power to intercept the refund to pay the support.

2. Will the office be able to collect arrears owing on support orders?

Yes. The office has the power to garnishee wages, seize property, force the sale of land, and even ask a judge to send a person to jail for failure to

pay. The amount that may be collected includes any arrears that have accumulated under a support order.

3. Why is this legislation required?

A majority of support orders made in this province are paid late, paid short or not paid at all. Because neglectful spouses refuse to pay support under court orders, numerous single parent families have had to turn to welfare.

4. When will this form of enforcement be available?

Enforcement of all support and custody orders is projected to be available by late fall 1986 or early 1987.

The Office of Support and Custody Enforcement is currently working to establish six regional offices around the province. Enforcement officers will be deployed from these offices to assist in the enforcement of support and custody orders. Furthermore, a computer system linking all regional offices with a central office in Toronto is currently being established.